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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1350

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Petitioner*

v.

WILLIAM A. WATERS AND DONALD SAMUELS, AND WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
A. The Proceedings Below	4
1. The complaint and its original dismissal by the District Court	4
2. The first decision of the Court of Appeals	5
3. The proceedings on remand in the District Court	6
4. The second decision in the Court of Appeals	7
B. The Undisputed Facts Relevant to This Petition	8
1. The facts on which the Court of Appeals based its conclusion that Plaintiff Waters had been discriminated against	8
2. The undisputed facts relating to the Union's liability	11
Reasons for Granting the Writ Herein If a Writ Is Granted in No. 74-1064	14
1. The non-relevance of 42 U.S.C. § 1981 to this case	15
2. The effect of 42 U.S.C. § 1981 on this case	18
3. The basis of union liability	20
4. The applicable statute of limitations	23
Conclusion	25

INDEX OF CITATIONS

Cases:	Page
Brady v. Bristol Meyers Co., 459 F.2d 621 (C.A. 8) ..	15
Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (C.A. 4)	15
Boys Markets v. Retail Clerks, 398 U.S. 235	17
Emporium Capwell Co. v. Western Addition Commun. Org., 95 S.Ct. 977	21
Franks v. Bowman Transportation Co., 495 F.2d 398 (C.A. 5), cert. denied in part, granted in part, 43 U.S.L.Wk. 3330, 3515	23
Green v. McDonnell Douglas Corp., 463 F.2d 337 (C.A. 8), vacated and remanded, 411 U.S. 792	23
Griffin v. Pacific Maritime Association, 478 F.2d 1118 (C.A. 9)	23
Griffin v. Prince Edward School Board, 377 U.S. 218 ..	18
Guerra v. Manchester Terminal Corp., 498 F.2d 641 (C.A. 5)	23
Hodges v. United States, 203 U.S. 1	5
J. I. Case Co. v. Labor Board, 321 U.S. 332	21
Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (C.A. 5)	8, 20, 23
Johnson v. Railway Express Corp., 489 F.2d 525 (C.A. 6), cert. denied in part, 417 U.S. 929	23
Jones v. Alfred H. Mayer Co., 392 U.S. 409 .	5, 15, 16, 17, 18
Long v. Ford Motor Co., 496 F.2d 500 (C.A. 6)	15, 19
Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y.)	22
Machinists v. Gonzales, 356 U.S. 617	21
Macklin v. Spector Freight Systems, 478 F.2d 979 (C.A.D.C.)	15, 23
McCrary v. Runyon (C.A. 4), Nos. 73-2350 *et seq.*, April 15, 1975	17, 18
NLRB v. International Van Lines, 409 U.S. 48	14
Norwood v. Harrison, 413 U.S. 455	18
Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (C.A. 5), cert. denied, 401 U.S. 948	15
Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574	21
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 ...	15
Tillman v. Wheaton-Haven Recreational Assn., 410 U.S. 431	15
Young v. International Telephone & Telegraph Co., 438 F.2d 747 (C.A. 3)	15

Page

STATUTES INVOLVED:

Civil Rights Act of 1866 § 1:

42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1982 ..... 5, 15, 16

Civil Rights Act of 1964, Title VII, 78 Stat. 253-266, 42 U.S.C. §§ 2000e *et seq.* 3, 4, 7, 8, 17, 18

Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 151:

§ 8(b)(3) 3
§ 8(d) 4
§ 9(a) 4, 21

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Petitioner United Order of American Bricklayers and Stone Masons, Local 21, a defendant in this action, prays that if certiorari is granted in the petition heretofore filed by plaintiffs, No. 74-1064, *Waters, et al.* v. *Wisconsin Steel Works, et al.*, to review a part of the judgment entered by the United States Court of Appeals for the Seventh Circuit in the above-entitled case on August 26, 1974, then certiorari should also be granted to review that portion of that judgment which is adverse to the present petitioner.

OPINIONS BELOW

The original opinion of the District Court was reported at 301 F.Supp. 663 and is reproduced at pp. 58a-63a of the separately bound appendix to this petition ("App."). The opinion of the Court of Appeals on the first appeal to it is reported at 427 F.2d 476 and is reproduced at App. 30a-56a. The opinion of the District Court after trial on remand is not officially reported and is reproduced at App. 23a-29a. The opinion of the Court of Appeals rendering the judgment of which review is sought herein is reported at 502 F.2d 1309 and is reproduced at App. 1a-20a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1974. A petition for rehearing was denied on November 26, 1974 (App. 21a). On February 13, 1975 and March 27, 1975, respectively, Mr. Justice Rehnquist entered orders extending the time within which to file the petition for a writ of certiorari until April 10 and further until April 25, 1975. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1981 forbid racial discrimination in private employment; if so, does it prohibit discriminatory practices other than the refusal to hire on the basis of race?

2. Does 42 U.S.C. § 1981 require the recall of a black worker who had not been discriminated against in hire over white workers who have a greater period of service for the employer, where none of the affected employees have a contractual right to be recalled?

3. May a union be found jointly liable with an employer for a violation of 42 U.S.C. § 1981 because the union was a party to a provision of a collective bargaining agreement which was racially neutral on its face, but was found illegal because the employer had previously engaged in racial discrimination in hire, where the union did not participate in the hiring?

4. If 42 U.S.C. § 1981 forbids racial discrimination in private employment, is the appropriate statute of limitations in a suit for back pay the residual statute of limitations of the State in which the alleged violation occurred?

STATUTES INVOLVED

1. 42 U.S.C. § 1981 provides that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. The major provisions of Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 253-66, 42 U.S.C. §§ 1971, 2000e-2000e-15) are set forth at App. 64a-85a.

3. The pertinent provisions of the Labor-Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. § 151 *et seq.*) provide:

> Sec. 8(b): "It shall be an unfair labor practice for a labor organization or its agents * * * (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)".

Sec. 8(d): "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, * * * "

Sec. 9(a): "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * * "

STATEMENT OF THE CASE

A. The Proceedings Below.

1. The complaint and its original dismissal by the District Court.

In December 1968, the complaint herein was filed in the United States District Court for the Northern District of Illinois by William A. Waters and Donald Samuels (hereafter "plaintiffs") against Wisconsin Steel Works of the International Harvester Company (hereafter "the Company") and the United Order of American Bricklayers and Stone Masons, Local 21 (hereafter "the Union"). The complaint asserted claims under § 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to e-15; § 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a); and the National Labor Relations Act, 29 U.S.C. §§ 151 to 167. The gravamen of the complaint was that the Company had engaged in racial discrimination with respect to

"its hiring of Negro bricklayers and its admission of Negroes into its bricklayers apprenticeship program"[1] so that the Company's seniority, layoff and recall policies and its collective bargaining agreement with the Union on these subjects were illegal (J.A. 4-6). It was alleged that Waters was employed by the Company between June and September 1964 (J.A. 2), but not that Waters had applied for a job before 1964, much less that he had been discriminatorily denied employment.

The Company and the Union moved to dismiss the complaint. The District Court granted their motions on the ground that the complaint failed to state a cause of action (App. 58a-63a).

2. The first decision of the Court of Appeals.

On appeal, the Court of Appeals for the Seventh Circuit reversed the complaint. Breaking new ground, the Seventh Circuit held that 42 U.S.C. § 1981 prohibits racial discrimination in private employment (App. 35a-40a). This conclusion was based on a reading of this Court's decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, interpreting 42 U.S.C. § 1982, "particularly * * * the Supreme Court's analysis of *Hodges* v. *United States*, 203 U.S. 1" (App. 37a-38a), and the Seventh Circuit's view of the legislative history (App. 38a-39a).

In its first opinion the Court decided one other proposition which remains pertinent: The time-bar applicable to an action based on 42 U.S.C. § 1981 "is con-

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[1] The Joint Appendix in the Court of Appeals shall be referred to herein as "J.A." The transcript of the trial shall be referred to as "Tr." followed by page citation. Both have been lodged with the Clerk of this Court.

trolled by the statute of limitations which governs the most analogous state action", and in Illinois that statute is the five-year limitations period "governing civil actions not otherwise provided for" (App. 49a-50a).

The Union and the Company petitioned for certiorari, but certiorari was denied, 400 U.S. 911.

3. The proceedings on remand in the District Court.

On remand, the parties entered into numerous factual stipulations which were embodied in a final pretrial conference order (J.A. 22-41). That order also stated the position of the parties with respect to the issues presented for decision. In their statement of issues the plaintiffs abandoned their claim of a breach of the duty of fair representation on the part of the union.[2] Thereafter, the case was tried without a jury before Judge William J. Campbell. On May 2, 1973, Judge Campbell issued his decision. He concluded that prior to April 1964 Wisconsin Steel had discriminated against blacks in the hiring of bricklayers and

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[2] The issues stated by plaintiffs were:

"1. Whether Title VII vests this Court with jurisdiction over defendant LOCAL 21 and whether Section 1981 vests this Court with jurisdiction over defendant WISCONSIN STEEL WORKS;

2. Whether defendant WISCONSIN STEEL WORKS discriminated against black bricklayers prior to April, 1964;

3. Whether defendants' adherence in decisions for employment, retention, dismissal or rehiring to a seniority system that has its genesis in a period of racial discrimination is in violation of Title VII and Section 1981;

4. Whether defendants' revision of the Severance Pay Agreement with its effect of permitting defendant WISCONSIN STEEL WORKS to re-employ their white bricklayers ahead of plaintiffs WATERS and SAMUELS is in violation of Title VII and Section 1981." (J.A. 34)

that the seniority system negotiated between the defendants "had its genesis in a period of racial discrimination". (App. 27a) He concluded further that the defendants had illegally discriminated against Waters by laying him off in September 1964, failing to recall him in March 1965 and laying him off in May 1967. He also determined that the June 5, 1966 agreement to amend the earlier severance pay agreement was illegal and discriminated against the rights of both Waters and Samuels (App. 27a-28a).

He directed that Wisconsin Steel offer the plaintiffs employment, and awarded each of them $5,000 back pay from the defendants jointly and severally.[3] He also awarded plaintiffs $5,000 attorneys fees to be paid by the defendants (App. 28a-29a). Plaintiffs filed a notice of appeal on July 27, 1973 (J.A. 104). Thereafter, the defendants filed cross-appeals (J.A. 105-106).

4. The second decision in the Court of Appeals.

On August 26, 1974, the Court of Appeals affirmed the judgment of liability in part as to plaintiff Waters, and reversed it in its entirety as to plaintiff Samuels. The case was remanded for further consideration on the question of damages and attorneys fees to Waters in light of the Court's opinion. (App. 20a).

For the purposes of the present petition the following holdings are pertinent:

a. The conclusion of the District Court that Wisconsin Steel had discriminated against black appli-

[3] The back pay award was made in the "exercise of the Court's discretion" under § 706(g) of Title VII (42 U.S.C. § 2000e-5(g) because of "the absence of a racially discriminatory motive on the part of the two defendants" (App. 29a).

cants for hire before 1964 was sustained (App. 9a-10a).

b. The Court held that the Company's seniority system does not perpetuate the effects of past discrimination and violates neither Title VII nor 42 U.S.C. § 1981 (App. 10a-16a).

c. "In light of Wisconsin Steel's past history of racially discriminatory hiring practices and the racially neutral yet potentially discriminatory impact of the employment seniority system utilized by the company, we hold that the June 1966 agreement reinstating contract recall rights to three white bricklayers was racially discriminatory with respect to Waters." (App. 16a).

d. The Union "shares jointly" in the Company's liability because the Union "was an integral party to the June 1966 amendment which discriminated against Waters. *Johnson* v. *Goodyear Tire & Rubber Co.*, 7 EPD, ¶ 9233 [491 F.2d 1364] (5th Cir. 1974)" (App. 17a-18a).

B. The Undisputed Facts Relevant to This Petition.

1. The facts on which the Court of Appeals based its conclusion that Plaintiff Waters had been discriminated against.

We first quote in its entirety the Court of Appeals' statement of the facts which bear on its conclusion that plaintiff Waters was discriminated against in violation of 42 U.S.C. § 1981 when former employees with longer service with the Company were reinstated in preference to him on January 17, 1967 (see App. 16a-17a, 18a):

> "With respect to the seniority system as it relates to Waters, it was established at trial that the collective bargaining agreements between Wiscon-

sin Steel and Local 21 have since 1946 provided for a "last hired, first fired" seniority system for bricklayers employed at Wisconsin Steel. The seniority system gives full credit to all bricklayers for their actual length of service or earned seniority as bricklayers. Seniority vests after a 90-day probationary period and may be broken by various events, including lay-offs in excess of two years. The system governs the order of lay-offs and recalls of bricklayers.

Waters first inquired about employment at Wisconsin Steel in the fall of 1957. He was told that no bricklayers were being hired. Approximately seven years later Waters inquired a second time for employment and was hired in July 1964. Two months later, in September 1964, Waters was laid off according to his length of service and before completing his 90-day probationary period and achieving contractual seniority status. Waters' lay-off was one of several lay-offs during late 1964 and 1965 which occurred as a result of an anticipated decrease in the steel plant's bricklaying needs because of a fundamental change in the steelmaking process. (During this period, Wisconsin Steel was converting from twelve open-hearth brick-lined furnaces to two basic oxygen furnaces, and, consequently, it had been anticipated that the volume of brick maintenance work would be correspondingly reduced.) By March 1965, over thirty bricklayers with up to ten years seniority had been laid off. Wisconsin Steel had expected that over half of the laid-off bricklayers, including eight bricklayers with five to six years seniority, would not be recalled within the two-year period and that pursuant to the terms of the collective bargaining contract these bricklayers' centractual seniority rights would be lost.

During the course of the next year, however, Wisconsin Steel became aware that it had under-

estimated its bricklayer requirements for the basic oxygen steelmaking process. The company therefore began recalling bricklayers in the order of their length of prior service.

Besides the contractual right of recall for those employees with contractual rights, Wisconsin Steel had a policy that former employees, including bricklayers who did not have contractual seniority rights would nonetheless be recalled according to their length of service. In March 1967, pursuant to this policy and not because of contractual right of recall, Waters was recalled. Waters accepted reinstatement and continued to work until May 19, 1967 when he was once again laid off because of a temporary reduction in plant operations. Waters was recalled on August 30, 1967, but refused this third offer of employment because he had another job and also, because he believed that his return to Wisconsin Steel might prejudice his then pending EEOC charges against Wisconsin Steel which he had filed in May 1966.

With respect to the amendatory agreements to the collective bargaining contract which plaintiffs challenge as discriminatory, the following evidence was adduced at trial. Prior to 1965, Wisconsin Steel, unlike other steel plants, had no provision for severance pay in its collective bargaining agreement with Local 21. However, in March 1965, after the decision had been made to lay off eight white bricklayers having five to six years seniority, the company negotiated a "severance agreement" with Local 21, dealing exclusively with these eight employees. The agreement provided that after being laid off the eight bricklayers could elect to retain their contractual seniority rights or receive $966.00 in severance pay. An election to retain contractual seniority rights carried with it the risk that these bricklayers would lose their seniority rights anyway after two

years on lay-off; this risk was believed to be substantial in view of Wisconsin Steel's anticipated decline in bricklaying needs. Consequently, the eight bricklayers, subsequent to their involuntary lay-off pursuant to seniority, elected to receive severance pay, thereby forfeiting their contractual seniority rights to recall.

As noted earlier, it became apparent to Wisconsin Steel in 1966 that it had underestimated its predicted bricklaying requirement for the basic oxygen process. In view of its new felt demand for bricklayers and its asserted belief that an injustice had been done to the eight bricklayers who had exchanged their contractual seniority rights for $966.00, the company proposed to Local 21 that the March 1965 severance pay agreement be partially nullified by an amendment restoring the eight bricklayers' contractual seniority rights for purposes of recall. Accordingly, an amendatory agreement was entered into in June 1966. Three of the eight white bricklayers who had previously accepted the severance pay also accepted the recall and returned to work, two in July 1966 and the third in January 1967. In each instance the man was rehired without reapplying with the company for employment." (App. 3a-5a)

2. The undisputed facts relating to the Union's liability.

The Court of Appeals based its conclusion that the Union was jointly liable with the Company for the violation of Waters' rights solely on the fact that the Union was an integral party to the June 1966 amendment to the severance pay agreement. See pp. 8-9, *supra*. The Court stated that it was "the company [which] proposed to Local 21 that the March 1965 severance pay agreement be partially nullified by an amendment restoring the eight bricklayers' contractual seniority

rights for purposes of recall" (App. 5a). The Court also observed, in discussing the violation, that there was a Company policy "pursuant to which plaintiff Waters was himself recalled, [which] provided that former employees without contractual rights of recall would nonetheless be recalled in order of their length of prior service" (App. 16a). That policy was found to be "no defense to the defendants' action in entering the June 1966 agreement" (App. 17a). The Court also found that it was Wisconsin Steel which "engaged in racially discriminatory policies" with respect to bricklayers prior to 1964 (App. 9a-10a, 17a). No such finding was made with respect to the Union. While it is our position that even if only these facts are considered, the Court erred as a matter of law in holding the Union liable, the record contains other undisputed facts which further support the Union's position that it was not legally responsible for the failure to recall Waters. We therefore set forth these facts, which appear either in the stipulation of the parties, in joint exhibits or in uncontradicted testimony:[4]

The Union represents bricklayers employed in Cook County, Illinois (J.A. 23). At the Company's plant the Union represents the bricklayers in a unit composed of "all bricklayers, bricklayer apprentices, and bricklayer leaders . . . " (jt. ex. 1, 2, § 3; Tr. 129), and the terms of their employment have been governed by collective bargaining agreements between the Company and the Union at least since 1944 (J.A. 24). Beginning no later than August 15, 1962, the agreements prohibit

[4] The stipulation became part of the pretrial order and is reproduced at pp. 23-31 of the Joint Appendix. The stipulated facts were expressly incorporated by reference into and made a part of, the District Court's findings (App. 24a).

inter alia racial discrimination in employment in the following terms (J.A. 27; jt. ex. 1, 2, § 2):

> "Neither the Company nor the Union, in carrying out their obligations under this Contract, shall discriminate in any manner whatsoever against any employe because of race . . . .
>
> The Company agrees to continue its present nondiscriminatory policy offering equal opportunities for available jobs to qualified applicants without regard for their * * * race * * *".

The Company exercises exclusive control over initial hire within the bricklayer work force (Tr. 145, J.A. 27). The Company operates its own bricklayer apprenticeship program in which the Union does not participate and over which it has no control (J.A. 29). Thus, the Union was not involved in any way, *and had no knowledge of the applications* for employment filed by the plaintiffs at any time with any employer, including the defendant Wisconsin Steel Works (J.A. 27). Since 1962 or 1963 an individual interested in employment with the Company as a bricklayer comes to its employment office and makes out an employment application for the job. Mail applications are also accepted. The application form does not call for or record the applicant's race either openly or secretly. The applications are filed in chronological order and are retained for one year. When the general foreman needs additional bricklayers he informs the employment office of the number he requires, and the employment office turns over to him "that number of applications, beginning with the oldest one on hand and counting off the required number." The Union has no arrangement with the Company for referral of brick-

layers to it for employment; the Company does not look to the Union as a source of workers (Tr. 144-145).

At no time has the Union refused to admit any individual to membership because of his race (J.A. 28). Blacks have participated in the prosecution of grievances through arbitration (J.A. 28; Tr. 80-89). The benefits of the collective bargaining agreement have been evenhandedly available to all employees regardless of race (J.A. 31). Neither Waters nor his co-plaintiff Samuels ever brought to, filed with, or made known to agents or officials of the Union any complaint against the Company (J.A. 27).

REASONS FOR GRANTING THE WRIT HEREIN IF A WRIT IS GRANTED IN NO. 74-1064

"There is a time for all things under the sun", not least "a time to make peace". In our view, the latest decision of the court below herein marked that time even though we strongly disagree with much of that decision and even though it adversely affects our interests. But, as evidenced by their petition in No. 74-1064, the plaintiffs are so anxious to pursue this litigation that, at least as we view it, they have rewritten the record and misstated what the Court of Appeals has held, in order to make of this case something that it is not. See our Memorandum in Opposition in No. 74-1064. Yet, if, notwithstanding our showing in that memorandum, the Court were to decide to adjudicate this controversy, it should have before it the entire case, so that it can do full justice to all the parties. For this reason, and out of an abundance of caution in face of the uncertainties generated by *NLRB* v. *International Van Lines,* 409 U.S. 48, 52, n. 4, we file this cross-petition for certiorari. And since we seek certiorari only in the event that the Court deter-

mines to review the judgment below at the plaintiffs' behest, our discussion of the merits will be confined to the bare minimum deemed necessary to describe our position to the Court.

1. The non-relevance of 42 U.S.C. § 1981 to this case.

The court below predicated the Union's liability here exclusively on 42 U.S.C. § 1981. The case, therefore, necessarily involves the questions whether § 1981 prohibits racial discrimination in private employment and if so, the scope of that prohibition. On the original appeal, the Seventh Circuit held that § 1981 "is intended to prohibit private racial discrimination in employment by companies and unions" (App. 36a). Review of that determination by this Court is singularly appropriate because the decision of the court below, and of the other courts that have adopted its construction of § 1981 [5] derives from a reading of this Court's holding in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, and its progeny,[6] that 42 U.S.C. § 1982 prohibits "*all* racial discrimination, private as well as public, in the sale or rental of property. . . ." (392 U.S. at 413, quoted at App. 36a, Court of Appeals' emphasis).

The Seventh Circuit reasoned that § 1981 and § 1982, which have a common origin in Section 1 of the 1866

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[5] *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (C.A. 5 cert. denied, 401 U.S. 948; *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 747 (C.A. 3); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (C.A. 4); *Brady* v. *Bristol Meyers Co.*, 459 F.2d 621 (C.A. 8); *Macklin* v. *Spector Freight Systems*, 478 F.2d 979 (C.A.D.C.); *Long* v. *Ford Motor Co.*, 496 F.2d 500 (C.A. 6).

[6] *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman* v. *Wheaton-Haven Recreational Assn.*, 410 U.S. 431.

Civil Rights Act, are analogous, and pointed to a footnote in *Jones* where this Court said: "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981 (. . . derived from § 1 of the Civil Rights Act of 1866. . . .)" (392 U.S. at 442, n. 78, as quoted at App. 36a-37a).

We do not dispute that §§ 1982 and 1981 are to be read together. As we said in our petition for certiorari after the original appeal (hereafter "1970 Pet."):

> "We may assume that the force of the reasoning of *Jones* v. *Mayer* requires the conclusion that section 1981, no less than section 1982, prohibits all interference with the rights it confers whether the source of that interference is private or governmental action." (1970 Pet., p. 17)

What we do assert, as we did there, is that

> "*Jones* v. *Mayer* does not define, contrary to the uncritical supposition into which the Court of Appeals slides, the scope of the right conferred by section 1981. In other words, while we may assume that section 1981 bars both private and governmental interference, it is still necessary to ascertain just what it is that section 1981 safeguards from interference." (*Id.*)

We believe that what § 1981 safeguards is the *legal capacity* to enter contractual relationships and to realize the fruits of the compact. Section 1981 invests in every person the same legal capacity "to make and enforce contracts" that a white person has.[7]

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[7] Indeed the Court of Appeals' interpretation renders almost wholly redundant § 1982 as interpreted in *Jones*, since to "purchase, lease, sell, hold, and convey property" are but specific incidents of contracting; except possibly for the "right to inherit," the prohibitions of § 1982 would therefore be unequivocally embraced within a prohibition of a racial refusal "to make and enforce contracts".

Even if § 1981 prohibits racial discrimination in private employment, it by no means follows, as the Court of Appeals also assumed, that that provision authorizes the courts to develop a general code of fair employment practices.[8] The right "to make and enforce contracts" is not a right to make and enforce them on any particular terms. The most that can be drawn by analogy from *Jones* (where the illegal act was the failure to enter into a real estate transaction) and the language of § 1981 is that this provision protects the right, to make employment contracts, that is, to be hired, without being subject to racial discrimination.

We note lastly that the consequences of this interpretation of 42 U.S.C. § 1981 are not restricted to the subject of employment. The right "to make and enforce contracts"—whatever it may be—embraces not only employment contracts but every service, product, or relationship for which a person can contract. If the courts of appeals have correctly understood the implication of *Jones,* then every private decision not to contract with a black because of his race is actionable under §1981. Only the other day the Fourth Circuit held it to be unlawful for a private school to deny admission to black children. *McCrary* v. *Runyon,* (C.A. 4, Nos. 73-2350 *et seq.,* April 15, 1975.) Having drawn from *Jones* the rule that the right to contract without being subject to racial discrimination is assured by § 1981, Chief Judge Haynsworth held:

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[8] Of course, if the courts are empowered by § 1981 to formulate a fair employment practices code, we maintain that they must follow the more recent Congressional determination on this subject, embodied in the Civil Rights Act of 1964. *Cf. Boys Markets* v. *Retail Clerks,* 398 U.S. 235. See 1970 Pet. pp. 25-30.

> "The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white." (Id. slip op. p. 10)

The proposition that admission to a private school is a contractual relationship is unassailable, and the holding in *McCrary* is inevitable, if the interpretation of 42 U.S.C. § 1981 which the court below adopted in this case may stand. Surprising as the result in *McCrary* may be, given the strenuous efforts deemed necessary by able counsel in cases such as *Griffin* v. *Prince Edward School Board*, 377 U.S. 218, *Norwood* v. *Harrison*, 413 U.S. 455, and the Girard College litigation, it is not more so than the first decision of the Court of Appeals herein was to those of us who believed that a historic breakthrough for the elimination of racial discrimination in private employment had been accomplished by the enactment of Title VII of the Civil Rights Act of 1964.

2. The effect of 42 U.S.C. § 1981 on this case.

If, contrary to our view, 42 U.S.C. § 1981 forbids racial discrimination in private employment, and extends beyond refusals to hire, the decision below is wrong because, in the name of enforcing § 1981, it mandated discrimination in reverse. The Court of Appeals held in this case that plaintiff Waters' rights under § 1981 had been violated because he was black and preference in re-employment had been given former employees who were white, and who had longer employment service with the Company but had broken their seniority by accepting severance pay. There is, of course, nothing in 42 U.S.C. § 1981 which forbids employers from using length of service as a basis for

choosing among applicants for employment or re-employment. Nor is there anything in that statute which requires an employer to exact a waiver of contractural rights based on service from employees to whom he has given severance pay, or which forbids the employer from thereafter taking their length of service into account despite their waiver. Rather, the Court of Appeals' theory was because Wisconsin Steel had discriminated against blacks in hiring prior to 1964,

> "[a] company policy of according priority to white bricklayers who had accepted the benefits of severance pay would, in our view, project the company into the realm of presently perpetuating the racial discrimination of the past. The company policy is no defense to the defendants' action in entering the June 1966 agreement restoring contractual seniority to three white bricklayers." (App. 17a.)

The result was that the Court interpreted 42 U.S.C. § 1981 to require that Waters (who was not found to have been denied a job and thereby deprived of the opportunity to accumulate seniority) to a preference over white employees, although he had a shorter period of service with the Company, and although he had no contractual right to recall.

The foregoing holding is contrary to the very requirement of equality which 42 U.S.C. § 1981 establishes, if it reaches this subject at all:

As the Court of Appeals for the Sixth Circuit said in *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (footnote omitted):

> "Section 1981 is by its very terms, however, not an affirmative action program. It is an equalizing

> provision, seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race. On this point we view the Supreme Court's discussion of Title VII as applicable to Section 1981.

The decision of the Seventh Circuit in Waters' favor canot be reconciled with this interpretation of § 1981.

3. The basis of union liability.

We set forth in its entirety that portion of the Court of Appeals' opinion which sustains the Union's liability:

> "Local 21 contends that there is insufficient evidence to support a claim against the union under section 1981. It is enough, however, that the union was an integral party to the June 1966 amendment which discriminated against Waters. *Johnson* v. *Goodyear Tire & Rubber Co.*, 7 EPD, ¶ 9233 [491 F.2d 1364] (5th Cir. 1974). Local 21 therefore shares jointly in the liability of Wisconsin Steel." (App. 17a-18a)

The matter is not nearly so simple. Indeed, the Fifth Circuit's decision in *Goodyear* did not hold that it is sufficient to union liability to show that it was party to an illegal collective bargaining agreement. Rather, the Court found that the "union was more than a passive participant in the contractual arrangements which furnished a substantial contribution to the discriminatory results evident here" (491 F.2d at 1381-1382). And even on those facts the Court held not, as did the Seventh Circuit herein, that the employer and the union were jointly liable, but apportioned the back pay award among the defendants (*id.* at 1382). On the Seventh Circuit's approach herein, by contrast,

all discussion of the nature and consequences of the Union's conduct is pretermitted.[9]

For purposes of this petition we may assume that § 1981 does reach the conduct of unions, acting as col-

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[9] The Court of Appeals' view of union liability is the product of basic misunderstanding of the relationship between the unions and the employees whom it represents. On the first appeal, the Court said:

> "Racial discrimination in employment by unions as well as by employers is barred by section 1981. The relationship between an employee and a union is essentially one of contract. Accordingly, in the performance of its functions as agent for the employees a union cannot discriminate against some of its members on the basis of race. (App. 39a)

It is well established, however, that this relationship derives not from contract, but from statute, namely § 9(a) of the Labor-Management Relations Act of 1947. See p. 4, *supra*. And it is because of "the very nature of the exclusive bargaining representative's status as representative of *all* unit employees" that this Court has held that "Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit" (*Emporium Capwell Co.* v. *Western Addition Commun. Org.*, 95 S.Ct. 977, 986). It is the duty of fair representation which is both the source and measure of the union's responsibility when it acts as bargaining representative. But it is the employer, not the union, who makes contracts with employees, and who therefore alone has power (even though its exercise may be illegal) to engage in racial discrimination in making employment contracts. Cf. *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 334-35, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583.

In a collective bargaining relationship the union contracts as representative of the employees (which brings into play the duty of fair representation); it does not contract with the employees. However, the union-member relationship is contractual in nature, *Machinists* v. *Gonzales*, 356 U.S. 617, 618. Thus, if § 1981 requires that the decision to contract or not to contract be made on a racially non-discriminatory basis, that provision prohibits a union from denying membership to individuals on the basis of their race.

lective bargaining representatives, which abets and aggravates racial discrimination against the employees. For, whereever the line establishing union liability may ultimately be drawn, the present case is at the farthest non-liability point on the continuum. We shall not repeat pertinent facts set forth at pp. 11-14, *supra;* we only point out the most significant. First, the 1966 agreement, which is the basis of the Union's liability, cannot be viewed in isolation. It merely restored the seniority relationship between the employees which existed before the severance pay agreement was entered into. Indeed, even if the 1966 agreement is viewed in isolation, the Union's participation therein did not adversely affect Waters, since absent the agreement the Company policy to prefer employees with longer service would have come into play. Second, the agreement was non-discriminatory on its face and was determined to give rise to liability in favor of Waters only because the Company had previously discriminated in hiring, over which it had complete control. Lastly, there is no showing that the Union was even on notice that entering into the 1966 agreement would have a racially discriminatory effect. In short, the Union can be found guilty only if the Civil Rights Act of 1866 is construed to impose liability without fault.[10]

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[10] To hold the union liable where it has done no more than to execute a collective bargaining agreement which is non-discriminatory on its face, would have serious adverse consequences for the enforcement of rights under the anti-discrimination laws. Employers whom the union charges with discrimination would not only threaten cross-claims against the union but would also move to disqualify the union as the employees' representative in the litigation because it would be jointly liable for any recovery. These tactics have already been employed by the defendant in *Lynch* v.

4. The applicable statute of limitations.

If 42 U.S.C. § 1981 permits an action for damages to remedy racial discrimination in private employment, the question necessarily arises as to what statute of limitations governs such an action. That question, of course, is a frequently recurring one, since it determines not only whether a plaintiff's claim is time-barred in its entirety but also the period for which damages may be recovered. This issue has generated a wide variety of views among the courts of appeals. And the particular solution reached by the Seventh Circuit in this case, that such suits are governed by the state statute which prescribes limitations for "civil actions not otherwise provided for" (App. 49a-50a) has been squarely rejected by the Fifth Circuit. Even a brief survey of the appellate decisions will reveal the current confusion and inconsistency on this question.

The Fifth Circuit has expressly disapproved both the theory that the applicable state statute of limitations is that governing claims not otherwise provided for, and also the theory that the applicable statute is that governing contract actions.[11] The Sixth Circuit

Sperry Rand Corp., 62 F.R.D. 78, 83-85 (S.D.N.Y.), where the Court did disqualify a union which had brought a major sex discrimination case; we are informed that *Sperry* is also serving as a blueprint for other employers faced with union actions to enforce the anti-discrimination laws. This does not mean, of course, that a union should gain immunity by threatening or bringing an anti-discrimination case. If the union, in violation of its duty of fair representation, has exacerbated the situation, a recovery against it may be had.

[11] *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641, 647-648 (C.A. 5). Following *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1378-1379 (C.A. 5), the Court held the applicable statute to be that which governs recovery of back pay. Accord: *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 405 (C.A. 5), cert. denied on other issues, 43 U.S.L.Wk. 3330, cert. granted on other issues, 43 U.S.L.Wk. 3515.

has also rejected the contract limitations period, in part because "the complaint [under § 1981] sounds in tort rather than in contract"; instead, that Court adopted a state statute which dealt with "civil actions for compensatory or punitive damages, or both, brought under the civil rights statute".[12] In contrast, the Seventh Circuit has herein held the residual statute to be applicable in preference to any specific statute, including the state Fair Employment Practices statute as we had urged. But the Eighth Circuit has accepted, with apparent approval, the position of both parties to the case that the statute governing suits on contracts is applicable.[13] The Ninth Circuit has taken the view that the applicable period of limitations is either that governing suits on contracts *or* the catch-all provision governing actions arising under statute other than for a penalty.[14] The District of Columbia Circuit has taken the similar but not identical position that the governing statute is either the catch-all provision or the contract statute,[15] thereby opting for precisely those alternatives which the Fifth Circuit has rejected.

The upshot is that the court below has held the residual statute to be applicable and the Ninth and D. C. Circuits have held that the residual statute may be applicable. However, the Fifth Circuit, has expressly rejected use of the residual statute, and the Sixth Cir-

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[12] *Johnson* v. *Railway Express Corp.*, 489 F.2d 525, 529 (C.A. 6), cert. granted on another issue, but denied on this issue, 417 U.S. 929.

[13] *Green* v. *McDonnell Douglas Corp.*, 463 F.2d 337, 340 (C.A. 8), vacated and remanded on other issues, 411 U.S. 792.

[14] *Griffin* v. *Pacific Maritime Association*, 478 F.2d 1118, 1119 (C.A. 9).

[15] *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 993-994 (C.A.D.C.).

cuit has done so implicitly by adopting a specific statute. The view that suits for contracts provide the closest analogy, which the Eighth, Ninth and D. C. Circuits have approved at least arguendo, is not accepted by the Fifth and Sixth Circuits. And, as to whether a state limitations statute governing civil rights applies, the Sixth Circuit has answered in the affirmative and the Seventh Circuit has answered in the negative. Only this Court can bring order out of this chaos, and in so doing resolve the direct conflict between the views of the court below in this case and the decisions of the Fifth and Sixth Circuits.[16]

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted if certiorari is granted in No. 74-1064, which arises out of the same judgment.

Respectfully submitted,

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[16] To be sure, unless this Court chooses to adopt a single national limitations period for employment discrimination cases under 42 U.S.C. § 1981, (as we have urged as an alternative to the state anti-discrimination limitation) total uniformity cannot be reached. But there should at least be agreement as to method; that is, as to the characterization of the state statute whose limitation is to be borrowed as a matter of federal law.